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Legislative Report: An Examination of the Laws & Practices regarding the Definition of “Employment” for the Purposes of Unemployment Compensation

Maine Department of Labor

Maine Bureau of Unemployment Compensation

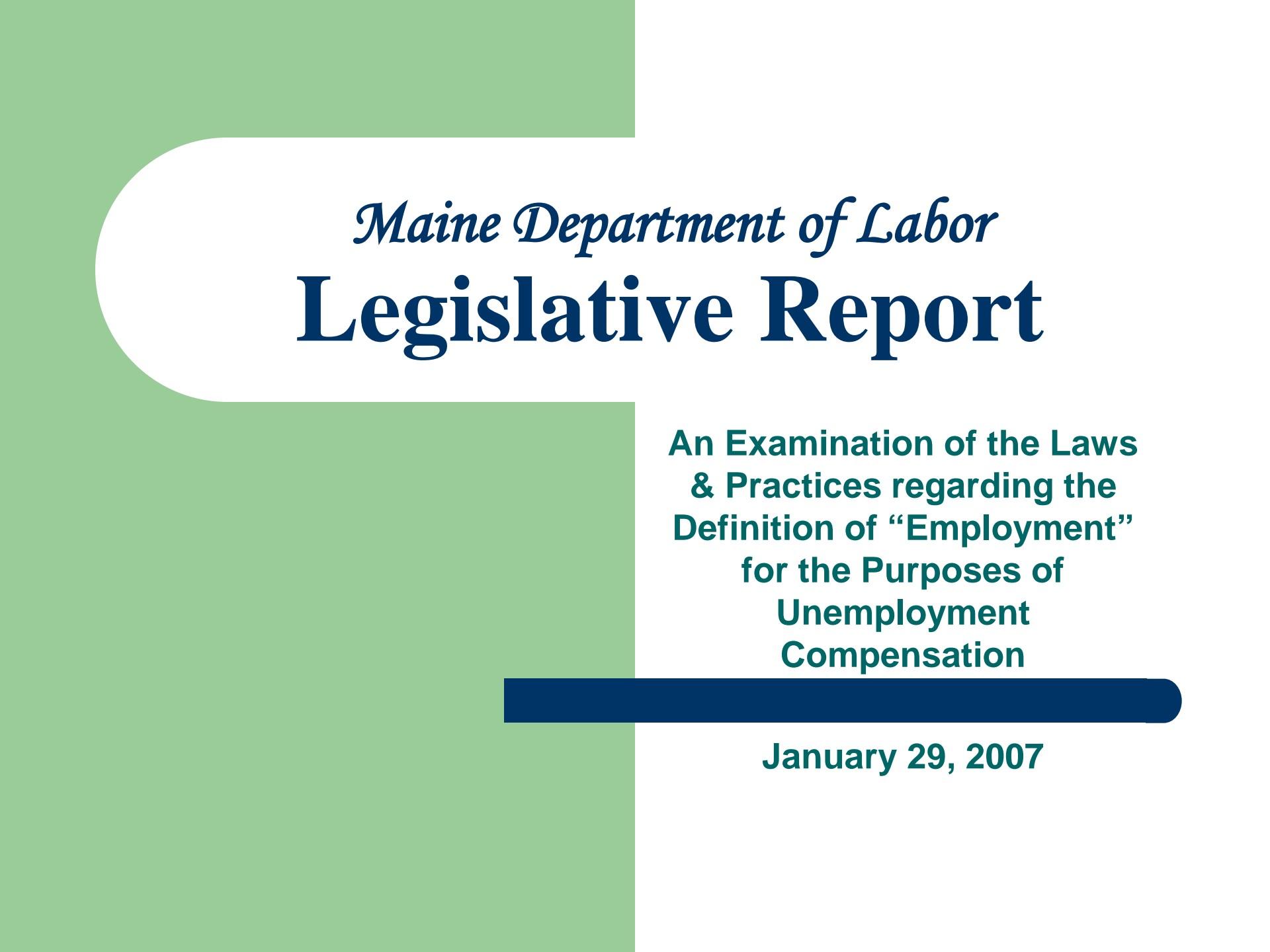
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Maine Department of Labor

Legislative Report

An Examination of the Laws
& Practices regarding the
Definition of “Employment”
for the Purposes of
Unemployment
Compensation

January 29, 2007

LD 1847 Study Resolve

- Adequacy of current “employment” definition & standards (ABC test) under Maine UI Law
- Need for or benefit of revising MDOL survey instrument used to apply ABC standards
- Need for or benefit of adopting the IRS employment standards & test
- Need for or benefit of adopting the WC employment standards & test
- Need for or benefit of instituting an IC pre-cert program similar to the Montana IC certification program

Conduct of Study

- MDOL invited 40,671 employers, 102,000 subcontractors & independent businesses, and 221 employment & labor attorneys to provide input
- Approximately **3%** of each group responded – 1275 employers, 3142 subcontractors & 6 attorneys
- Wide range of industries represented. Construction - highest responses in both but Professional & Technical Services almost equaled construction in the IC survey.
- Retail, Manufacturing, Healthcare & Social Services, Education, and Finance & Insurance industries also well represented in both survey responses

Conduct of Study Continued

- Internal review & analysis of each of the resolve mandates in consultation with the Attorney General's Office, the Workers' Compensation Board and the Unemployment Insurance Commission
- Other states
- Examined Montana's independent contractor pre-certification program.

Employment Tests

- Majority of employers and subcontractors aware of the multiple employment tests.
- Many commented that the ABC test & law is confusing and difficult to understand – but only a small percentage indicated it had a negative impact.
- ABC test, the IRS/MRS test and the WC test - essentially equal in degree of difficulty in understanding & application.

Employment Tests Continued.

- Also rated all 3 tests as essentially equal in adequately assessing whether an individual is an employee or independent contractor.
- Majority of employers recommended *against* changing the UI definition for employment & the ABC test.

Employment Tests Continued

- Internal review & analysis showed strong similarities between the IRS, WC and ABC employment tests
- Major difference - the ABC test is based on a “presumption of employment,” neither IRS or WC is.
- “Presumption of employment” is the foundation of the Maine Unemployment Compensation Program and is key to its capacity to carry out its statutory mission to protect against the hazards of unemployment for the unemployed worker, the worker’s family and the community.

Employment Tests Continued

- IRS & WC tests require an examination of a number of separate factors – none of which are determinative or take precedence.
- No set parameters as to how many of the factors must be present to determine if employment exists between an individual & business.
- Introduces element of subjectivity & moves process further away from ‘certainty’. Increases risk of inequitable application of law and increases potential for litigation.

Montana IC Pre-Certification Program

- Applied for by independent, good for 2 years, applies to WC and UI.
- Requires a binding waiver of workers comp protection for period in-force (federal law prevents an individual from waiving UI protection rights –not binding for UI).
- IC must have cert or business must cover for WC.
- Can be revoked, hiring business & independent subject to fines for non-adherence to certification reqs.
- Montana's program requires 13-member staff to administer - \$1.3 million annual budget. Did not replace investigative or audit staff of either WC or UI programs – additive.

Montana IC Pre-Certification Program Continued

- Majority of survey respondents were *either* opposed to or unsure of need or feasibility of implementing an IC pre-cert program in Maine.
- Of major concern to both employers and subcontractors were added costs, added controls, and increasing layers of unnecessary government.
- Maine Workers' Compensation Board opposed to a binding pre-certification program due to the waiver of one's rights to protection under this program.

Findings and Recommendations

- Based on data gathered and analyzed - neither MDOL nor the Unemployment Insurance Commission supports or finds benefit in replacing the UI employment definition with either the IRS or WC definitions and tests.
- However, the Workers' Compensation Board has expressed a willingness to consider adopting the UI standards & ABC test for WC purposes - would streamline, reduce confusion and improve consistency in employment determinations across both insurance programs.

Adoption of IC Pre-Cert Program

- After carefully weighing all the data obtained, the MDOL, the Unemployment Insurance Commission & the Workers' Compensation Board recommend against instituting such a program in Maine, nor do the majority of employers and subcontractors who responded to the survey support such an action.
- Of concern for all groups is the binding nature of the certification, waiving of worker protection, the high cost of administration and for survey respondents in particular, the increased layer of government oversight that such a program would create.

Reduce Confusion/Improve Clarity

- Although majority of Employers voted not to change the UI employment definition & test, most respondents agreed that the law was difficult and confusing which can lead to worker classification errors.
- MDOL recommends taking proactive measures to improve the clarity and effectiveness of its employer communications on the law, its application and procedures.
- Recommend setting up a workgroup to include employer representation to review its UI employer tax notices and informational materials to identify ways to reduce confusion.